FILED
NOV 13 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940

No. 571-572

ARTHUR T. HORMANN,

*Petitioner,*

*vs.*

THE NORTHERN TRUST COMPANY, a corporation, JOHN RUSSELL TANNER, WILBUR CLARK TANNER, ANNA E. TANNER, THEODORE W. TANNER and EMILY TANNER PEARSON,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI.

CARL V. WISNER,
CARL V. WISNER, JR.,
*Solicitors for Petitioner.*

EARNEST A. SKINNER,
*Of Counsel.*

McCORMICK AND HENDERSON, INC., CHICAGO

## TABLE OF CASES

PAGE

A. C. Motor Freight Lines, Inc. v. Shingledecker, (C.C.A. 7), 70 F2d 827 ..... 12

American National Red Cross v. Raven Honey Dew Mills, (C.C.A. 8), 74 F2d 160 ..... 11, 23

Barton v. Automobile Insurance Co., (C.C.A. 1), 63 F2d 631 ..... 10, 21

Bisbee Linseed Co. v. Paragon Paint & Varnish Co. (C.C.A. 2), 66 F2d 595 ..... 10, 21

Blumenfeld v. Union National Bank, (C.C.A. 10), 38 F2d 455 ..... 33

Bogan v. Hynes, (C.C.A. 9), 65 F2d 524 ..... 11, 19, 23

Brown Sheet Iron & Steel Co. v. Maple Leaf Oil & Refining Co., (C.C.A. 8), 68 F2d 787 ..... 11, 23

Chase v. African Methodist Episcopal Church, (C.C.A. 3), 108 F2d 977 ..... 12, 24

Clark v. Milens, (C.C.A. 9), 32 F2d 1004 ..... 13, 33

Dalton v. Hazelet, (C.C.A. 9), 182 Fed. 561 ..... 11, 23

Detroit Trust Co. v. Woodworth, Collector, (C.C.A. 6), 110 F2d 829 ..... 11, 22

Federal Surety Co. v. A. Bentley & Sons Co., (C.C.A. 6), 51 F2d 24 ..... 12, 25

Ford v. Grimmett, (C.C.A. 5), 275 Fed. 140 ..... 11, 22

Fraad Talking Machine Co. v. Empire Mfg. Co., (C.C.A. 2), 250 Fed. 618 ..... 10, 21

Glick v. United States, (C.C.A. 7), 93 F2d 953 ..... 22

Hallenbeck v. Leimert, (C.C.A. 7), 72 F2d 480 ..... 11, 22

Harris et al. v. United States, (C.C.A. 4), 70 F2d 897 .. 11, 21

Helvering v. Gowran, 302 U. S. 238 ..... 34

Insurance Co. v. Tweed, 7 Wall 44 ..... 10, 21

Interstate Folding Box Co. v. Empire Box Corp., (C.C.A. 7), 68 F2d 500, 292 U S. 657 ..... 11, 12

Keeley v. Ophir Hill Consolidated Mining Co., (C.C.A. 8), 169 Fed. 598 ..... 33

Kelly v. Central Hanover Trust Co., (C.C.A. 2), 85 F2d 61 ..... 30

Martin v. Drexel Ice Cream Co., (C.C.A. 7), 80 F2d 768 .. 34

Meyer v. Everett Pulp & Paper Co., (C.C.A. 9), 193 Fed. 857 ..... 33

PAGE

Montgomery v. Erie R. R. Co., (C.C.A. 3), 97 F2d 289.... 23
Murray v. Louisiana, 163 U. S 101 .....11, 24
Neblett v. Carpenter, 305 U. S. 297 .....11, 24
Northern Idaho & Montana Power Co. v. Jordan, (C.C.A. 9), 262 Fed. 765 ..... 33
Nowata County Gas Co. v. Henry Oil Co., (C.C.A. 8), 269 Fed 742 ..... 33
Ogden City v. Weaver, (C.C.A. 8), 108 Fed. 564..... 33
Oriole Phonograph Co. v. Kansas City etc. Co., (C.C.A. 8), 34 F2d 400 .....12, 26
Perry v. Wiggins, (C.C.A. 8), 57 F2d 622.....5, 7, 13, 18, 20
Pratt v. Stout, (C.C.A. 8), 85 F2d 172.....12, 26
Prosser v. Chapman, (C.C.A. 4), 2 F2d 134 .....12, 25
Pulaski-Lonoke Drainage Dist. et al. v. Missouri Pacific R. Co., (C.C.A. 8), 44 F2d 899.....6, 12, 26, 28, 29
Reilly v. Beekman, (C.C.A. 2), 24 F2d 791 .....10, 21
Rickard v. Thompson, (C.C.A. 9), 72 F2d 807 .....12, 13, 26
Rieke Metal Products Co. v. Finney, (C.C.A. 7), 70 F2d 509 ..... 12
P H. & F. M. Roots Co. v. United States, (C.C.A. 7), 17 F2d 337 .....11, 22
Saltonstall v. Birtwell, 150 U. S. 417 ..... 31
Shipe v. Consumers Service Co., (C.C.A. 7), 29 F2d 321 .....12, 26
Speh v. Bullard, (C.C.A. 5), 90 F2d 227 .....12, 25
Texas Ranger etc. Co. v. Robinson, (C.C.A. 5), 272 Fed. 453 .....13, 32
Townsend v. Beatrice Creamery Ass'n., (C.C.A. 8), 138 Fed. 381 .....11, 13, 23, 32
United States v. Copper Queen Consolidated Mining Co., 189 U. S. 495 .....12, 24
United States v. Galveston-Houston Electric Co., (C.C.A. 1), 84 F2d 516 .....10, 21
United States v. Hill, (C.C.A. 2), 34 F2d 133.....10, 21
United States v. King & Howe, Inc., (C.C.A. 2), 78 F2d 693 .....10, 21
United States v. Archibald McNeil & Sons Co., 276 U. S. 302 .....10, 20

PAGE

United States v. Stephanidis, (C.C.A. 2), 47 F2d 554..10, 21
United States v. Wells, 283 U. S. 102 ..... 32
Walton v. Southern Pacific Co., (C.C.A. 9), 53 F2d 63..11,23
Yangstze Rapid S. S. Co. v. Deutsche-Asiatische Bank, (C.C.A. 9), 59 F2d 8 ..... 11
Zimmerman v. Harding, 227 U. S. 489 .....11, 24

## STATUTES CITED

Illinois Revised Statutes, 1939, Chapter 3, Section 200 .....7, 35
Section 240 (a) Judicial Code, 28 U.S.C.A. Section 347..2, 9
Rules of Civil Procedure, Section 46..... 7

## INDEX TO BRIEF.

Opinion of the Court below ..... 9
Jurisdiction of this Court ..... 9
Statement of the Case ..... 9
Specification of Errors ..... 10
Summary of Argument ..... 14
Argument
I. The ascertainment of the intention of a testator, as expressed in a will, is a determination of fact.. 18
II. In the absence of a certificate of evidence, a reviewing court can consider only questions of law apparent on the face of the pleadings insofar as they directly relate to the court's jurisdiction .... 20
III. In the absence from the record of a certificate of evidence, the reviewing court must presume that there was substantial evidence to sustain the court's decree ..... 24
IV. The burden is upon the appellant to see that the evidence, if any, is in the record, or to show by appropriate action that no evidence was offered or received ..... 27
V. The opinion of the trial court cannot be resorted to for the purpose of determining what the evi-

PAGE

dence before that court was, in the absence from the record of a certificate of evidence ..... 31

VI. A decree in equity, if right for any reason, must be affirmed ..... 34

VII. The law of Illinois, as expressed in its statutes (Ill. Rev. Stat., 1939, Ch. 3, Sec. 200), is that legacies to descendants of the testator do not lapse when the legatee dies before the testator.... 35

Conclusion ..... 36

## SUBJECT INDEX.

Petition for Writ of Certiorari ..... 1

A. Jurisdiction of this Court ..... 2

B. Summary Statement of Matters Involved ..... 2

C. Reasons Relied on for the Allowance of the Writ.... 5

1. Conflict with numerous cases on scope of review on "strict record" ..... 5

2. Conflict with numerous cases on substitution of opinion of trial court for certificate of evidence.... 5

3. Conflict with *Perry* v. *Wiggins,* (C.C.A. 8), 57 F2d 622, on scope of review ..... 5

4. Conflict with *Pulaski-Lonoke Drainage Dist. et al.* v. *Missouri Pacific R. Co.,* (C.C.A. 8), 44 F2d 899, on burden of presenting evidence to reviewing court ..... 6

5. Raises question: Can court decide factual questions adversely to appellee on a "strict record" 6

6. Conflict with *Perry* v. *Wiggins,* (C.C.A. 8), 57 F2d 622, on whether ascertainment of a testator's intention is decision of a question of ultimate fact or law ..... 7

7. Disregard of principle that decree must be affirmed if right for any reason ..... 7

8. Assumption that statutory law is the opposite of plain statement of statute ..... 7

Prayer for Writ of Certiorari ..... 7

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940

---

No. .....

---

ARTHUR T. HORMANN,

*Petitioner,*

*vs.*

THE NORTHERN TRUST COMPANY, a corporation, JOHN RUSSELL TANNER, WILBUR CLARK TANNER, ANNA E. TANNER, THEODORE W. TANNER and EMILY TANNER PEARSON,

*Respondents.*

---

## PETITION FOR WRIT OF CERTIORARI.

---

**To the United States Circuit Court of Appeals For the Seventh Circuit.**

---

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Arthur T. Hormann complains of the decree and opinion of the United States Circuit Court of Appeals for the

Seventh Circuit, dated July 10, 1940, reported 114 F2d (Advance Sheets) 118, entered in a certain cause pending therein entitled *Arthur T. Hormann* v. *The Northern Trust Company, et al.*, Nos. 7254-7255, reversing the decree of the United States District Court for the Northern District of Illinois, Eastern Division, in favor of petitioner (R. 84), and respectfully petitions for a writ of certiorari to review the same as against The Northern Trust Company and Anna E. Tanner, Theodore W. Tanner and Emily Tanner Pearson, respondents.

## A

## JURISDICTION OF THIS COURT.

This application for a writ of certiorari is made under subdivision (a) Section 240 of the Judicial Code (28 U.S.C.A., Section 347). The suit was to decide the ownership of a fund. The decision of the Circuit Court of Appeals is final.

## B

## SUMMARY STATEMENT OF MATTERS INVOLVED.

Petitioner, one of the heirs of Sarah De Loss, deceased, sued The Northern Trust Company, individually and as trustee under her will, for one-half of the corpus of a trust created thereby, after the termination of the trust upon the death of the last life tenant on March 27, 1939. Respondents Anna E. Tanner et al. intervened, claiming the one-half of the corpus claimed by petitioner. Respondents John Russell Tanner et al. intervened claiming the other one-half of the corpus. A hearing was had in open court; an opinion was filed finding that petitioner was entitled to the half claimed (R. 59), and a final decree was entered February

15, 1940, in conformity with such opinion (R. 84).

An appeal, without supersedeas, was taken by respondents Anna E. Tanner et al., on a record consisting solely of the pleadings, (R. 2, 8, 13-23, 35-38, 42-59), opinion of the court (R. 59-64), findings of fact and conclusions of law (R. 71-84) and the final decree (R. 84-86); respondent The Northern Trust Company moved to enter a supplemental decree (R. 88-89) and, when the motion was denied, appealed with supersedeas (R. 113) on a like record.

When the case was docketed in the Circuit Court of Appeals, petitioner moved on March 20, 1940, (R. 133) to dismiss the appeal of respondents Anna E. Tanner et al. or affirm the decree as to them, the motion being based on the following grounds (R. 135):

> "1. That it appears in and by the record filed herein, both from the findings of fact (R. 71, line 26), and from the decision of the court (R. 60, 61), that evidence was taken and heard in open court in support of the contentions of this appellee (petitioner), and was considered by the court in reaching its decision.
>
> "2. That such evidence was not preserved in a Certificate of Evidence or otherwise.
>
> "3. That, as a matter of law, the only question before the court is the regularity of the judgment roll and the conformance of the decree (R. 84) to the Findings of Fact and Conclusions of Law (R. 71 *et seq.*) all of which are complete and sufficient in all respects, * * *"

The motion to dismiss or affirm was denied without prejudice to petitioner's right to renew the same at the hearing of the cause on the merits (R. 164).

At the argument, the court below proceeded to retry the questions of fact, reversing the decree, and although petitioner's motion to dismiss or affirm was renewed, this

motion was denied by the court with the following comments (R. 174):

> "Appellee Hormann filed a motion in this court asking us to dismiss the appeal, or in the alternative to affirm the decree. In explanation of our refusal to dismiss the appeal, it is fair to say that this phase of the motion was based on the fact that appellants had not incorporated in the record the transcript of all of the testimony. It is obvious from the court's memorandum and from the motion itself, that this refers to certain testimony, not divulged, calculated to show the facts and circumstances surrounding the testatrix at the time she made her will. So far as we are informed there was no further testimony offered. It was received subject to appellants' objections, and afterwards the court sustained the objections, and no exceptions were saved to that ruling. Under these circumstances, we think the error, if any, must have been the court's ruling in sustaining the objections to the evidence, and that question is not presented, nor is the proffered evidence before us. Moreover, the rule provides that it shall be applied under conditions named, unless other contexts of the *will* clearly disclose a different intention. We do not understand that this provision can be extended to include outside circumstances and statements, even those of the testatrix, in order to avoid the rule. The entire will is before us, and that would seem to be sufficient."

The court then reviewed the trial court's decision of ultimate fact (R. 81), that it was the testatrix' intention that on the death of the life tenant one-half the fund should go to petitioner, and held, instead, that the fund should go to respondents Anna E. Tanner et al.

C

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The case presents questions of public importance, since the judgment of the Circuit Court of Appeals in denying petitioner's motion to dismiss is in square conflict with all other cases of like nature in the Federal courts. The rule, as stated in petitioner's motion to dismiss (R. 135), quoted above, is that the only question before a reviewing court on a "strict record" is the regularity of the judgment roll and the conformance of the decree to the pleadings, findings of fact, and conclusions of law. The leading decisions establishing the conflict are set out in the appended brief. (See Point II, Argument.)

2. The case presents further questions of public importance in that, for the first time in the history of the appellate review in the United States, the opinion of a trial court has been substituted for a certificate of evidence, in the absence of the latter from the record, to determine the nature of evidence offered. It has always been the rule that, while the opinion of the trial court is informative of that court's reasoning, it may not be used as a substitute for an omitted certificate of evidence. The result of the court's decision and judgment is a square conflict with the cases set out in subdivision V of the appended brief and argument (See Point V, Argument).

3. The case presents a square conflict in action with *Perry* v. *Wiggins*, (C. C. A. 8), 57 F2d 622, 625. The court below held "The entire will is before us, and that would seem to be sufficient" (R. 174). In *Perry* v. *Wiggins*, 57 F2d 622, the Eighth Circuit refused review, even though the entire will was before it. (See Point I, Argument).

4. The case presents further questions of public importance since it squarely raises questions which have not previously been decided by the Supreme Court, in spite of the long history of our jurisprudence. The questions raised concern the duty of a successful appellee in preparing a record for review. The well-considered Eighth Circuit case of *Pulaski-Lonoke Drainage Dist.* v. *Missouri Pacific R. Co.*, 44 F2d 899, states the rule, at page 901,

> "It is the duty of the appellant to see that the evidence, if any, is in the record, or by appropriate action to show that no evidence was offered or received."

In the instant case, the Circuit Court of Appeals has stated,

> "It (the evidence) was received subject to appellants' objections, and afterwards the court sustained the objections, and no exceptions were saved to that ruling. Under these circumstances, we think the error, if any, must have been the court's ruling in sustaining the objections to the evidence, and that question is not presented, nor is the proffered evidence before us."

These remarks are tantamount to requiring a successful appellee to participate actively in the preparation of a certificate of evidence and record with the burden of added expense which such activity would occasion.

If it be the duty of the successful appellee to see that the record is complete, rather than the duty of the appellant as the Eighth Circuit has indicated, it would be well for the profession and the litigating public to be so informed of such rule by an authoritative decision of this court (See Point IV, Argument).

5. The case presents the following question of importance which has not clearly been passed upon by the Supreme Court: Can a court decide factual questions adversely to an appellee on a "strict record" or "record

proper," which includes no certificate of evidence? (See Point I, Argument.)

6. The court has fallen into grievous error and is in conflict with *Perry* v. *Wiggins,* (C. C. A. 8), 57 F2d 622, in assuming the ascertainment of a testator's intention is a question of law. The disposition of property under a will is a question of ultimate fact (*Perry* v. *Wiggins,* 57 F2d 622). Decisions on questions of fact cannot be reviewed on a "strict record" or "record proper" (See Points I and II, Argument).

7. The questions involved in this case are further of public importance because the Circuit Court of Appeals has disregarded the established precept that a decree must be affirmed if it is right for any reason (See Point VI, Argument).

8. On a crucial point of the case, the court below has assumed the law of Illinois to be that legacies to a descendant of a testator lapse if the legatee dies before the testator. The law, as exemplified by statute, (Ill. Rev. Stat. 1939, Ch. 3, Sec. 200), is exactly contra. (See Point VII, Argument). While such a decision may not amount to a denial of due process of law, it is very close to the line, and should call for the exercise of the Supreme Court's power of supervision.

9. The opinion of the Circuit Court of Appeals will create confusion since it indicates the necessity of saving exceptions to rulings, when the use of exceptions was abolished after September 1, 1938, by Rule 46 of the Rules of Civil Procedure. This case was filed after such rules went into effect.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court

to certify and send to this court, on a day designated, for its review and determination, a full and complete transcript of the record and all proceedings in the United States Circuit Court of Appeals for the Seventh Circuit had in said cause, to the end that said cause may be reviewed and determined by this court, as provided by law, and that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, reversing the decree of the United States District Court for the Northern District of Illinois, Eastern Division, may be reversed, and that your petitioner may have such other and further relief in the premises as to this court will seem meet and just.

CARL V. WISNER,
CARL V. WISNER, JR.,
*Solicitors for Petitioner.*

EARNEST A. SKINNER,
*Of Counsel.*

# BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

## I.

## OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit was rendered July 10, 1940. Rehearing was denied September 23, 1940. The opinion is reported in 114 F2d (Advance Sheets) 118.

## II.

## JURISDICTION OF THIS COURT.

1. The jurisdiction of this court is based on Judicial Code Section 240, as amended by the Act of February 13, 1925, 28 U. S. C. A. Section 347. The jurisdiction of the District Court arose through diversity of citizenship.

2. The original date of the judgment sought to be revised is July 10, 1940. A petition for rehearing was filed, by leave of Court, July 29, 1940, (R. 185), and the rehearing was denied September 23, 1940 (R. 186).

3. The questions raised in this court on this record are, in substance, whether or not the Circuit Court of Appeals for the Seventh Circuit should have granted petitioner's motion to dismiss the appeal of respondents Anna E. Tanner et al. or to affirm the decree.

## III.

## STATEMENT OF THE CASE.

The essential facts of the case necessary to pass upon the merits of this petition are fully stated in the accompany-

ing petition for certiorari, subdivision B, "Summary Statement of Matters Involved," and in the interests of brevity are not repeated here.

## IV.

## SPECIFICATION OF ERRORS.

Detailed specification of errors is set forth under subdivision C of the accompanying petition, "Reasons Relied on for the Allowance of the Writ," and may be summarized as follows:

1. A conflict exists between the opinion and judgment below and the following decisions in respect of whether or not, in the absence of a bill of exceptions or certificate of evidence, the court is confined to a consideration of the judgment roll and the conformance of the decree with the pleadings, findings of fact and conclusions of law:

*United States* v. *Archibald McNeil & Sons Co.*, 267 U. S. 302, 307;

*Insurance Co.* v. *Tweed*, 7 Wall. 44, 51;

*United States* v. *Galveston-Houston Electric Co.*, (C.C.A. 1), 84 F2d 516;

*Barton* v. *Automobile Insurance Co.*, (C.C.A. 1), 63 F2d 631;

*Fraad Talking Machine Co.* v. *Empire Mfg. Co.*, (C.C.A. 2), 250 Fed. 618;

*Reilly* v. *Beekman*, (C.C.A. 2), 24 F2d 791;

*United States* v. *Hill*, (C.C.A. 2), 34 F2d 133;

*United States* v. *Stephanidis*, (C.C.A. 2), 47 F2d 554;

*Bisbee Linseed Co.* v. *Paragon Paint & Varnish Co.*, (C.C.A. 2), 66 F2d 595;

*United States* v. *King & Howe, Inc.*, (C.C.A. 2), 78 F2d 693;

*Harris et al.* v. *United States,* (C.C.A. 4), 70 F2d 897;
*Ford* v. *Grimmett,* (C.C.A. 5), 275 Fed. 140;
*Detroit Trust Co.* v. *Woodworth, Collector,* (C.C.A. 6), 110 F2d 829;
*P. H. & F. M. Roots Co.* v. *United States,* (C.C.A. 7), 17 F2d 337;
*Interstate Folding Box Co.* v. *Empire Box Corp.,* (C.C.A. 7), 68 F2d 500, certiorari denied, 292 U. S. 657;
*Hallenbeck* v. *Leimert,* (C.C.A. 7), 72 F2d 480;
*Townsend* v. *Beatrice Creamery Ass'n.,* (C.C.A. 8), 138 Fed. 381;
*Brown Sheet Iron & Steel Co.* v. *Maple Leaf Oil & Refining Co.,* (C.C.A. 8), 68 F2d 787;
*American National Red Cross* v. *Raven Honey Dew Mills,* (C.C.A. 8), 74 F2d 160;
*Dalton* v. *Hazelet,* (C.C.A. 9), 182 Fed. 561;
*Walton* v. *Southern Pacific Co.,* (C.C.A. 9), 53 F2d 63;
*Yangstze Rapid S. S. Co.* v. *Deutsch-Asiatische Bank,* (C.C.A. 9), 59 F2d 8;
*Bogan* v. *Hynes,* (C.C.A. 9), 65 F2d 524.

2. A conflict exists between the opinion and judgment below and the following decisions in respect of whether or not, the record containing no certificate of evidence, and a hearing having been had in open court during the course of which evidence was taken, it must be presumed that competent evidence was adduced at the trial to support the decree:

*Neblett* v. *Carpenter,* 305 U. S. 297, 304;
*Zimmerman* v. *Harding,* 227 U. S. 489, 496;
*Murray* v. *Louisiana,* 163 U. S. 101, 108;

*United States* v. *Copper Queen Consolidated Mining Co.*, 185 U. S. 495;
*Chase* v. *African Methodist Episcopal Church*, (C.C.A. 3), 108 F2d 977;
*Prosser* v. *Chapman*, (C.C.A. 4), 2 F2d 134;
*Speh* v. *Bullard*, (C.C.A. 5), 90 F2d 227;
*Federal Surety Co.* v. *Bentley & Sons Co.*, (C.C.A. 6), 51 F2d 24;
*Shipe* v. *Consumers Service Co.*, (C.C.A. 7), 29 F2d 321;
*Rieke Metal Products Co.* v. *Finney*, (C.C.A. 7), 70 F2d 509;
*A. C. Motor Freight Lines, Inc.* v. *Shingledecker*, (C.C.A. 7), 70 F2d 827;
*Oriole Phonograph Co.* v. *Kansas City etc. Co.*, (C.C.A. 8), 34 F2d 400;
*Pulaski-Lonoke Drainage Dist. et al.* v. *Missouri Pacific R. Co.*, (C.C.A. 8), 44 F2d 899;
*Pratt* v. *Stout*, (C.C.A. 8), 85 F2d 172;
*Rickard* v. *Thompson*, (C.C.A. 9), 72 F2d 807.

3. A conflict exists between the opinion and judgment below and the following decision in respect of whether or not "it is the duty of the appellant to see that the evidence, if any, is in the record, or by appropriate action to show that no evidence was offered or received.":

*Pulaski-Lonoke Drainage Dist. et al.* v. *Missouri Pacific R. Co.*, (C.C.A. 8), 44 F2d 899.

4. A conflict exists between the opinion and judgment below and the following decisions in respect of whether or not a reviewing court may examine the trial court's opinion to ascertain the facts or evidence in the absence of a cer-

tificate of evidence in the record:

*Texas Ranger etc. Co.* v. *Robinson,* (C.C.A. 5), 272 Fed. 453;
*Townsend* v. *Beatrice Creamery Ass'n.,* (C.C.A. 8), 138 Fed. 381;
*Clark* v. *Milens,* (C.C.A. 9), 32 F2d 1004;
*Rickard* v. *Thompson,* (C.C.A. 9), 72 F2d 807.

5. A conflict exists between the opinion and judgment below and the following decision in respect of whether or not the ascertainment of a testator's intention is a question of fact or law, and in respect of whether or not, when the will is before the reviewing court, anything further is necessary for review:

*Perry* v. *Wiggins,* (C.C.A. 8), 57 F2d 622.

6. The court has decided factual questions against petitioner, successful appellee below, on a "strict record" or "record proper."

7. The court has overlooked a pertinent Illinois statute, and reversed a cause, assuming the law to be precisely contrary to what the statute states it is.

## V.

## SUMMARY OF ARGUMENT.

### I.

**The ascertainment of the intention of a testator as expressed in a will is a determination of fact.**

*Perry* v. *Wiggins,* (C.C.A. 8), 57 F2d 622;
*Bogan* v. *Hynes,* (C.C.A. 9), 65 F2d 524;

### II.

**In the absence of a certificate of evidence, a reviewing court can consider only questions of law apparent on the face of the pleadings insofar as they directly relate to the court's jurisdiction.**

*United States* v. *Archibald McNeil & Sons Co.,* 267 U. S. 302;
*Insurance Co.* v. *Tweed,* 7 Wall. 44;
*United States* v. *Galveston-Houston Electric Co.,* (C.C.A. 1), 84 F2d 516;
*Barton* v. *Automobile Insurance Co.,* (C.C.A. 1), 63 F2d 631;
*Fraad Talking Machine Co.* v. *Empire Mfg. Co.,* (C.C.A. 2), 250 Fed. 618;
*Reilly* v. *Beekman,* (C.C.A. 2), 24 F2d 791;
*United States* v. *Hill,* (C.C.A. 2), 34 F2d 133;
*United States* v. *Stephanidis,* (C.C.A. 2), 47 F2d 554;
*Bisbee Linseed Co.* v. *Paragon Paint & Varnish Co.,* (C.C.A. 2), 66 F2d 595;
*United States* v. *King & Howe, Inc.,* (C.C.A. 2), 78 F2d 693;

*Harris et al.* v. *United States,* (C.C.A. 4), 70 F2d 897;
*Ford* v. *Grimmett,* (C.C.A. 5), 278 Fed. 140;
*Detroit Trust Co.* v. *Woodworth, Collector,* (C.C.A. 6), 110 F2d 829;
*P. H. & F. M. Roots Co.* v. *United States,* (C.C.A. 7), 17 F2d 337;
*Interstate Folding Box Co.* v. *Empire Box Corp.,* (C.C.A. 7), 68 F2d 500, certiorari denied, 292 U. S. 657;
*Hallenbeck* v. *Leimert,* (C.C.A. 7), 72 F2d 480;
*Glick* v. *United States,* (C.C.A. 7), 93 F2d 953;
*Townsend* v. *Beatrice Creamery Ass'n.,* (C.C.A. 8), 138 Fed. 381;
*Brown Sheet Iron & Steel Co.* v. *Maple Leaf Oil & Refining Co.,* (C.C.A. 8), 68 F2d 787;
*American National Red Cross* v. *Raven Honey Dew Mills,* (C.C.A. 8), 74 F2d 160;
*Dalton* v. *Hazelet,* (C.C.A. 9), 182 Fed. 561;
*Walton* v. *Southern Pacific Co.,* (C.C.A. 9), 53 F2d 63;
*Yangstze Rapid S S. Co.* v. *Deutsch-Asiatische Bank,* (C.C.A. 9), 59 F2d 8;
*Bogan* v. *Hynes,* (C.C.A. 9), 65 F2d 524.

## III.

**In the absence from the record of a certificate of evidence, the reviewing court must presume that there was substantial evidence to sustain the court's decree.**

*Neblett* v. *Carpenter,* 305 U. S. 297, 304;
*Zimmerman* v. *Harding,* 227 U. S. 489, 496;
*Murray* v. *Louisiana,* 163 U. S. 101, 108;

*United States* v. *Copper Queen Consolidated Mining Co.*, 185 U. S. 495;
*Chase* v. *African Methodist Episcopal Church*, (C.C.A. 3), 108 F2d 977;
*Prosser* v. *Chapman*, (C.C.A. 4), 2 F2d 134;
*Speh* v. *Bullard*, (C.C.A. 5), 90 F2d 227;
*Federal Surety Co.* v. *A. Bentley & Sons Co.*, (C.C.A. 6), 51 F2d 24;
*Shipe* v. *Consumers Service Co.*, (C.C.A. 7), 29 F2d 321;
*Rieke Metal Products Co.* v. *Finney*, (C.C.A. 7), 70 F2d 509;
*A. C. Motor Freight Lines, Inc.* v. *Shingledecker*, (C.C.A. 7), 70 F2d 827;
*Oriole Phonograph Co.* v. *Kansas City etc. Co.*, (C.C.A. 8), 34 F2d 400;
*Pulaski-Lonoke Drainage Dist. et al.* v. *Missouri Pacific R. Co.*, (C.C.A. 8), 44 F2d 899;
*Pratt* v. *Stout*, (C.C.A. 8), 85 F2d 172;
*Rickard* v. *Thompson*, (C.C.A. 9), 72 F2d 807.

## IV.

**The burden is upon the appellant to see that the evidence, if any, is in the record, or by appropriate action to show that no evidence was offered or received.**

*Pulaski-Lonoke Drainage Dist. et al.* v. *Missouri Pacific R. Co.*, (C.C.A. 8), 44 F2d 899.

## V.

**The opinion of the trial court cannot be resorted to for the purpose of determining what the evidence before him was, in the absence from the record of a certificate of evidence.**

*Saltonstall* v. *Birtwell,* 150 U. S. 417;
*United States* v. *Wells,* 283 U. S. 102;
*Texas Ranger etc. Co.* v. *Robinson,* (C.C.A. 5), 272 Fed. 453;
*Townsend* v. *Beatrice Creamery Co.,* (C.C.A. 8), 138 Fed. 381;
*Clark* v. *Milens,* (C.C.A. 9), 32 F2d 1004;
*Rickard* v. *Thompson,* (C.C.A. 9), 72 F2d 807;
*Blumenfeld* v. *Union Nat'l Bank,* (C.C.A. 10) 38 F2d 455;
*Martin* v. *Drexel Ice Cream Co.,* (C.C.A. 7) 80 F2d 768.

## VI.

**A decree in equity, if right for any reason, must be affirmed.**

*Helvering* v. *Gowran,* 302 U. S. 238;

## VII.

**The law of Illinois, as expressed in its statutes, (Ill. Rev. Stat., 1939, Ch. 3, Sec. 200) is that legacies to descendants of the testator do not lapse when the legatee dies before the testator.**

## ARGUMENT.

### I.

**The ascertainment of the intention of a testator as expressed in a will, is a determination of fact.**

The court below and counsel for the respondents Anna E. Tanner et al. have been proceeding throughout this controversy under the erroneous impression that the ascertainment of the proper claimant to a fund created under a will is the decision of a question of law; that the only requisites of a sufficient record to determine such question are the pleadings, the so-called findings of fact and conclusions of law, and the decree.

The rule is to the contrary, however. The ascertainment of the proper claimant is the decision of a question of ultimate fact; since it is the decision of a question of fact, it cannot be decided upon a "strict record" or "record proper" which permits review of questions of law only.

The rule relied on by petitioner is clearly set forth in two fully considered opinions in the Eighth and Ninth Circuits.

*Perry* v. *Wiggins*, (C. C. A. 8), 57 F2d 622, was a contest between rival claimants to real estate, devolution of title being under a will. The action was at law and was tried by the court without a jury upon a stipulation of fact including, among other items, the will in question. In holding that there was nothing before the court which it could review, it was said, per Judge Gardner, at page 625,

> "The facts as agreed upon were presented to the court as the evidence in the case. For instance, a copy of the will is set out. This was not an ultimate fact. The ultimate fact was that by will the testator made certain disposition of the property. * * *
>
> "No request for declaration of law having been made, there is nothing presented for examination, ex-

> cept the primary record. * * * As the judgment is sustained by the primary record, no prejudicial error is shown, and the judgment appealed from is therefore affirmed."

In the instant case, the decree is clearly sustained by the primary record. By his complaint (R. 3) petitioner demanded "judgment against (respondent The Northern Trust Company) in the sum of $17,340.34 and an accounting," etc. The court found the ultimate fact (R. 81) "That it was the intention of (the testator) * * * that after the death of (the life tenant) all that part of said fund, if any, remaining should go to (petitioner), * * *" The decree (R. 84-85) was that petitioner "take one-half of the funds in the hands of the (respondent) The Northern Trust Company" subject to costs and the like.

*Bogan* v. *Hynes,* (C. C. A. 9), 65 F2d 524, was an ejectment action, the ultimate question being ownership under a deed. No bill of exceptions or statement of the evidence was in the record. The court said, at page 525, per Judge Wilbur,

> "The statement of ownership, title, or interest by the court as resting in any individual is a finding of ultimate fact and not a conclusion of law. * * *
>
> "It is immaterial whether the findings of the ultimate fact is in the 'findings of fact' or in the so-called 'conclusions of law', *Lewis* v. *Ingram,* (C. C. A. 10), 57 F2d 463, 466; *Compania Transcontinental etc.* v. *Mex. Gulf Oil Co.,* (C. C. A. ....), 292 F. 846. In the case at bar, the finding as to title is in the conclusions of law and is that the title to the property is vested in the defendants. The finding of this ultimate fact supports the judgment and requires an affirmance of the judgment."

It is also to be observed that the action of the court below, applying its theory (R. 174) "the entire will is before us, and that would seem to be sufficient." conflicts directly

with the action of the Eighth Circuit in *Perry* v. *Wiggins*, 57 F2d 622, in refusing to examine the proceedings irrespective of the fact that the entire will and numerous findings were before it. The conflict is real and should be resolved in favor of one approach or the other.

## II.

**In the absence of a certificate of evidence, a reviewing court can consider only questions of law apparent on the face of the pleadings insofar as they directly relate to the court's jurisdiction.**

Respondents brought to the Court of Appeals only the pleadings, findings of fact and conclusions of law, the opinion of the trial court, and the decree. This type of record is known as a "strict record" or "record proper." On such a record and in view of the issue of fact made up by the pleadings and settled by the decree, a reviewing court can consider only the conformance of the pleadings and decree. The merits of the finding of ultimate fact in the decree are foreclosed by respondents' failure to bring up a certificate of evidence.

Courts have been consistent and unanimous in such ruling. At the risk of repetition, we believe their unanimity can best be portrayed by a series of brief quotations from the cases on which we rely, which are as follows:

**United States Supreme Court**

*United States* v. *Archibald McNeil & Sons Co.*, 267 U. S. 302,

"As the record contains no bill of exceptions, upon this direct writ of error we can review only questions of law apparent on the face of the pleadings in so far

as they directly relate to the court's jurisdiction." (page 307, per Mr. Justice McReynolds).

See also, *Insurance Co.* v. *Tweed*, 7 Wall 44, 51, (per Mr. Justice Miller).

**First Circuit**

*United States* v. *Galveston-Houston Electric Co.*, 84 F2d 516,

"The evidence on which the master made his findings is not reported, and unless his findings were clearly erroneous as a matter of law, they will not be disturbed by this court." (page 521, per Judge Wilson).

See also, *Barton* v. *Automobile Insurance Co.*, 63 F2d 631, 635, (per Judge Wilson).

**Second Circuit**

*Reilly* v. *Beekman*, 24 F2d 791,

"A bill of exceptions was necessary to make the so-called transcript a part of the record, and without one the record is limited to 'the pleadings, the process, the verdict, and the judgment. * * *' *Clune* v. *U. S.*, 159 U. S. 590. In view of the foregoing, the only questions really open for consideration are whether the judgment was justified in view of the pleadings." (page 794, per Judge A. N. Hand).

See also, *Fraad Talking Machine Co.* v. *Empire Mfg. Co.*, 250 Fed. 618, 619 (per Judge Hough); *United States* v. *Hill*, 34 F2d 133, 135 (per Judge A. N. Hand); *United States* v. *Stephanidis*, 47 F2d 554, (per Judge Swan); *Bisbee Linseed Co.* v. *Paragon Paint & Varnish Co.*, 66 F2d 595, 597, (per Judge Chase); *United States* v. *King & Howe, Inc.*, 78 F2d 693, 695 (per Judge Swan).

**Fourth Circuit**

*Harris et al.* v. *United States*, 70 F2d 897,

"Where there is no bill of exceptions properly be-

fore the court, the record which we may consider on appeal is limited to the pleadings, process, verdict and judgment." (page 898, per District Judge Wm. C. Coleman).

**Fifth Circuit**

*Ford* v. *Grimmett,* 278 Fed. 140,

"The record does not contain a bill of exceptions, agreed statement of facts, or findings of fact. It does contain unauthenticated notes, which purport to contain the evidence submitted at the trial, and also an opinion of the District Judge. We have nothing before us, therefore, except the petition and answer, by which to test the correctness of the judgment." (page 141, per Judge Bryan).

**Sixth Circuit**

*Detroit Trust Co.* v. *Woodworth, Collector,* 110 F2d 829,

"No bill of exceptions was filed, and we therefore consider only the sufficiency of the facts found to support the judgment." (page 831, per Judge Allen).

**Seventh Circuit**

*Interstate Folding Box Co.* v. *Empire Box Corp.,* 68 F2d 500, certiorari denied 292 U. S. 657,

"For want of a properly prepared and properly certified statement of the evidence, the decree must be affirmed" (page 500, per Judge Evans).

See also, *P. H. & F. M. Roots Co.* v. *United States,* 17 F2d 337, 338 (per Judge Alschuler); *Hollenbeck* v. *Leimert,* 72 F2d 480, (per Judge FitzHenry); *Glick* v. *United States,* 93 F2d 953, 955, (per Judge Evans).

**Eighth Circuit**

*Townsend* v. *Beatrice Creamery Association,* 138 Fed. 381,

> "As the decree shows that the cause was heard upon the cross-bill, answer, and reply, and the proofs in the case, the dismissal of the cross-bill was therefore predicated on the proofs for want of equity. The proofs not being before the court, it results that the decree of the circuit court must be affirmed" (page 383, per District Judge Philips).
>
> See also, *Brown Sheet Iron & Steel Co.* v. *Maple Leaf Oil Refining Co.,* 68 F2d 787, 788 (per Judge Gardner); *American National Red Cross* v. *Raven Honey Dew Mills,* 74 F2d 160, 162, (per Judge Woodrough).

**Ninth Circuit**

*Bogan* v. *Hynes,* 65 F2d 524,

> "This case was tried without a jury and there is no bill of exceptions or statement of the case in the record. Therefore, the only question involved on this appeal is whether or not the findings support the judgment" (page 525, per Judge Wilbur).
>
> See also, *Dalton* v. *Hazelet,* 182 Fed. 561, 570 (per Judge Ross); *Walton* v. *Southern Pacific Co.,* 53 F2d 63, 69 (per Judge Sawtelle).

The unanimity evidenced in the foregoing citations would continue though they were multiplied many fold. If they correctly reflect the law, the court below should have granted petitioner's motion and dismissed or affirmed the decree. Only where the merits can be ascertained from the pleadings without benefit of evidence, as in *Montgomery* v. *Erie R. R. Co.,* (C.C.A. 3), 97 F2d 289, can the merits be determined upon a "strict record" or "record proper."

## III.

**In the absence from the record of a certificate of evidence, the reviewing court must presume that there was substantial evidence to sustain the court's decree.**

The instant record shows that there was an issue of fact framed by the pleadings, a hearing at which evidence was taken, and a decree for petitioner. The evidence being absent from the record, the reviewing court must presume that sufficient evidence was adduced below to sustain the court's decree. The incongruity of the decision and judgment below can best be observed from a brief series of quotations from leading cases, as follows:

**United States Supreme Court**

*Neblett* v. *Carpenter,* 305 U. S. 297,

"The record upon which the appeal was taken to the Supreme Court of the State, and which has been brought here by our writ, contains only the judgment roll. The evidence is not before us and the court below has held that, under the State law, the judge was not bound to make special findings. We must presume that there was substantial evidence to sustain the court's decree" (page 304, per Mr. Justice Roberts).

See also, *Zimmerman* v. *Harding,* 227 U. S. 489, 496 (per Mr. Justice Lurton); *Murray* v. *Louisiana,* 163 U. S. 101, 108 (per Mr. Justice Shiras); *United States* v. *Copper Queen Consolidated Mining Co.,* 185 U. S. 495, 498 (per Mr. Justice Peckham).

**Third Circuit**

*Chase* v. *African Methodist Episcopal Church,* 108 F2d 977,

"It results that on this appeal the record, while containing the district court's findings, does not contain

the testimony upon which those findings were based. We must therefore assume that the findings of fact were supported by the evidence which the court had before it" (page 978, per Judge Maris).

**Fourth Circuit**

*Prosser* v. *Chapman,* 2 F2d 134,

"Every reasonable doubt, in such circumstances will be resolved in favor of the correctness of the trial court's decision; and this is particularly true where the appellant has seen fit not to bring the testimony taken by the master and considered by the court up as a part of the record here" (page 136, per Judge Waddill).

**Fifth Circuit**

*Speh* v. *Bullard,* 90 F2d 227,

"They (appellants) must fail, too, in their attack upon the findings, as without evidence to support them, because of the complete absence from the record of a statement of the evidence. In this condition of the record we may not inquire whether, we must assume that, the findings are adequately supported" (page 228, per Judge Hutcheson).

**Sixth Circuit**

*Federal Surety Co.* v. *A. Bentley & Sons Co.,* 51 F2d 24,

"It may be said parenthetically that since the record contains no statement of evidence, either in narrative or any other form, we must assume that all the findings of fact made by the master and approved by the court are sustained by the evidence, and conclusive upon the parties hereto" (page 26, per Judge Simons).

**Seventh Circuit**

*Shipe* v. *Consumers Service Co.*, 29 F2d 321,

"For appellant it is contended that the record discloses no evidence whereon to base the finding by the court. The record discloses no evidence at all. There is no certificate of evidence, and in its absence we may not infer that there is no evidentiary basis for the court's finding" (page 322, per Judge Alschuler).

See also, *Rieke Metal Products Co.* v. *Finney*, 70 F2d 509, 512 (per Judge Alschuler); *A. C. Motor Freight Lines, Inc.* v. *Shingledecker*, 70 F2d 827, 828 (per Judge Sparks).

**Eighth Circuit**

*Pulaski-Lonoke Drainage Dist. et al.* v. *Missouri Pacific R. Co.*, 44 F2d 899,

"But when the record is silent it will be presumed that evidence was adduced, the burden devolving upon appellant to see that his record affirmatively supports his contentions" (page 901, per Judge Van Valkenburgh).

See also, *Oriole Phonograph Co.* v. *Kansas City Fabric Products Co. et al.*, 34 F2d 400, 401 (per Judge Gardner); *Pratt* v. *Stout*, 85 F2d 172, 176 (per Judge Sanborn).

**Ninth Circuit**

*Rickard* v. *Thompson*, 72 F2d 807,

"As appellant has failed to include in the record any of the evidence taken at the trial and the only statement as to evidence is contained in the opinion of the court, which amply sustains the findings and decree, this court must presume that these findings are correct" (page 809, per Judge Garrecht).

If the foregoing quotations correctly reflect the law,

and their unanimity is conclusive on such a question, the court below was bound to find, the evidence not being preserved in the record, that substantial competent evidence was before the trial court to establish the proposition that the respondents Anna E. Tanner et al. "take nothing under, by or through the last will and testament of Sarah De Loss, deceased" (R. 85).

## IV.

**The burden is upon the appellant to see that the evidence, if any, is in the record, or by appropriate action to show that no evidence was offered or received.**

When respondents Anna E. Tanner et al. filed their designation of contents of the record on appeal (R. 109), it was obvious that they did not propose to take up for review any questions of fact which had been passed upon by the trial court, since there is no specification in the designation for the transmission of a certificate of evidence to the reviewing court. The question immediately presented itself to counsel for the petitioner, when the notice of the filing of the designation was served, what questions, under the designation, would be before the Circuit Court of Appeals, and whether it was necessary for the petitioner as an appellee to said appeal to amend and supplement the record by including a certificate of evidence.

Reference to the authorities promptly solved these questions.

As we have indicated, (Section II, *supra*), the authorities are unanimous that, when an appeal is taken on a "strict record" or "record proper," the only question before the reviewing court is the propriety of the decision in view of the pleadings and findings.

A question still to be considered was whether there was any duty upon the petitioner, as a prospective appellee to the appeal, to preserve and transmit the evidence to the Circuit Court of Appeals. This question was answered in the negative by *Pulaski-Lonoke Drainage Dist. et al.* v. *Missouri Pacific R. Co.*, (C.C.A. 8), 44 F2d 899.

That case is clear and can leave no doubt of the proper rule to be followed. In passing upon a similar record, Judge Van Valkenburgh said, at page 901 of the opinion,

> "No evidence is contained in the record brought. Appellant in brief insists that none was taken. Appellee insists that the record sustains the finding and judgment of the trial court. We are remitted to the rule that it is the duty of the appellant to see that the evidence, if any, is in the record, or by appropriate action to show that no evidence was offered or received."

It is obvious, in view of this clear statement of procedure, that whatever deficiencies might exist in the record were the responsibility of the appellants alone; if there were any questions which might have been decided upon a record containing all of the evidence, but which could not be decided because of the absence of the evidence from the record, the party suffering must be the appellants; further, the appellee was entitled to rely upon the proposition, substantiated by numerous cases referred to under subdivision III of this argument, that, if evidence was taken and not preserved, it would be presumed to be adequate to sustain the decree.

The court below has disregarded and contravened all of these rules and decisions in achieving a reversal.

It is for this reason that we urge this court to consider this case upon a full argument and announce authoritatively whether the rule of practice stated by Judge Van Valken-

burgh in the *Pulaski-Lonoke* case is correct; whether a successful appellee may rely upon the proposition that it is the duty of the appellant to see that the evidence, if any, is in the record; whether the successful appellee can rely upon the proposition that, if the appellant brings up nothing but a "strict record," the question of the propriety of the decree in view of the pleadings and findings is the only one before the reviewing court; whether the successful appellee can rely upon the proposition that, upon appeal upon a "strict record" all possible factual questions must be answered in the appellee's favor and that the decree must be plainly wrong upon the law, granting that all possible pertinent facts favor the appellee.

The propositions stated and upon which this petitioner, as appellee, relied, when reviewing the effect of respondents' designation of the record, are so clear that it is incomprehensible that a court could have departed from them and reversed a case as the reviewing court has reversed the instant case. The principal desideratum, in providing for review of decisions of the Circuit Courts of Appeal by certiorari to the Supreme Court, is to make the law upon which the profession and the litigating public must rely as certain as possible. We thought the law was certain, as we have indicated from a review of the authorities upon which we relied. If the court below is right, the numerous decisions squarely in conflict with its procedural approach to the instant case are necessarily wrong.

As matters stand now, an appellee faced, as was petitioner in the instant case, with an appellant's taking up an appeal on a short record, upon examining the authorities will find Judge Van Valkenburgh's statement that, if any evidence was taken, it is the duty of the appellant to bring it up; they will likewise find the statement of the court

below, as preserved in the headnote of the annotator of the West Publishing Co. in the Federal Reporter, under Courts, Sec. 405 (16),

> "An appeal would not be dismissed on the ground that appellants had not incorporated in record transcript of all of testimony, where it was obvious from District Court's memorandum and from motion itself that motion referred to certain testimony which was received subject to appellants' objections, and that afterwards District Court sustained the objections, and no exceptions were saved to such ruling."

We believe the annotater has fairly paraphrased the proposition of law stated in the opinion of the court below.

The question then is, is the Seventh or the Eighth Circuit correct in its approach. While the decision of each Circuit is binding within the Circuit, a petitioner outside either of the Circuits would not possibly know what approach another reviewing court would take in the matter.

It is not enough to say that the safe mode of proceeding is for the appellee to prepare a certificate of evidence and have it included in the record. This adds to the client's expense after the case has been won, preliminarily at least, and it may not be practicable; the evidence may consist of many thousands of pages and the reviewing court may decide, after its inclusion in the record, that taking up the evidence was unnecessary for a decision of the case on a "strict record." In such event the appellee would be burdened with considerable additional expense for improperly including unnecessary matters in the record under rules which prevail in all of the Circuits. Nor is it practicable to go to the Circuit Court of Appeals in each case to decide just how much of the record should be brought up, as was done in the case of *Kelly* v. *Central Hanover Trust Co.*, (C.C.A. 2), 85 F2d 61.

These considerations seem most persuasive of the proposition that this court should grant certiorari in the instant case and settle once and for all, in an authoritative opinion, the respective duties of the appellant and the appellee in making up a record.

## V.

**The opinion of the trial court cannot be resorted to for the purpose of determining what the evidence before him was, in the absence from the record of a certificate of evidence.**

The reviewing court, confronted with petitioner's motion to dismiss, said, in effect, "We are overruling this motion to dismiss because we can see from the trial court's opinion that any evidence omitted was not important."

Contrary to the court's statement (R. 174) that "if was obvious * * * from the motion itself" that petitioner was complaining about the omission of certain testimony, the motion (R. 135) simply points out that evidence was heard and no certificate of evidence was included in the record.

In looking into the trial judge's opinion and drawing therefrom its own conclusions as to the nature of the evidence which it heard, the court departed completely from all precedent.

We do not find any instance in which the Supreme Court has passed upon the propriety of using the trial court's opinion in lieu of a certificate of evidence. The Supreme Court has, however, passed upon attempts to bolster defective findings of fact by references to the trial court's opinion and in each instance has discountenanced such procedure. In *Saltonstall* v. *Birtwell,* 150 U. S. 417, it was said by Mr. Chief Justice Fuller, at page 419,

"We are of opinion that the facts set forth in the special findings are not sufficient to support the judgment. * * * The opinion might help the findings out, but cannot be resorted to for that purpose."

A more recent statement may be found in *United States* v. *Wells,* 283 U. S. 102, where it was stated, at page 120, by Mr. Chief Justice Hughes,

"The only difficulty presented by the record is that this statement with respect to the motive of the decedent appears in the opinion of the court and not in its findings of fact. We are not at liberty to refer to the opinion for additional findings."

Several of the Circuits, however, have been confronted with the argument that they might refer to the trial court's opinion in lieu of a certificate of evidence, where the latter was missing from the record. Their approach to this problem is as follows:

**Fifth Circuit**

*Texas Ranger Producing & Refining Co.* v. *Robinson,* 272 Fed. 453,

"We may not properly treat the opinion of the court as findings of fact. It is not incorporated in the bill of exceptions and has no place there. It is required to be printed in the record merely for our information as to the views of the trial court. It is not a substitute for and cannot take the place of a bill of exceptions." (page 455, per Judge Bryan).

**Eighth Circuit**

*Townsend* v. *Beatrice Creamery Association,* 138 Fed. 381,

"There is not one word of evidence preserved in this record. Counsel seem to have assumed that the

memorandum opinion filed by the trial judge during the pendency of the case, which is sent up with the record, can be referred to on this appeal for the ascertainment of the essential facts in evidence. This is a fatal misconception. Recourse cannot be had to such opinion to ascertain the facts." (page 382, per Philips, District Judge).

See also, *Ogden City* v. *Weaver,* 108 F. 564, 566 (per Judge Thayer); *Keeley* v. *Ophir Hill Consolidated Mining Co.,* 169 Fed. 598, 600 (per Judge Adams); *Nowata County Gas Co.* v. *Henry Oil Co.,* 269 Fed. 742, 744 (per Johnson, District Judge).

**Ninth Circuit**

*Rickard* v. *Thompson,* 72 F2d 807,

"As heretofore stated, the evidence as adduced on the trial is not in the record. Appellant relies for support of her contention by reference to matters appearing in the opinion of the court below, but the rule is well settled that on appeal recourse cannot be had to an opinion rendered by the court below to ascertain the facts, where there is no evidence in the record and where the case was decided on issues of fact." page 810, per Judge Garrecht).

See also, *Meyer* v. *Everett Pulp & Paper Co.,* 193 Fed. 857, 863 (per Judge Wolverton); *Northern Idaho & Montana Power Co.* v. *Jordan,* 262 Fed. 765, 766 (per Judge Gilbert); *Clark* v. *Milens,* 32 F2d 1004, 1005 (per Judge Rudkin).

**Tenth Circuit**

*Blumenfeld* v. *Union National Bank,* 38 F2d 455,

"There is an intimation in the opinion of the court below that at the hearing, in the answer to an inquiry, the receiver stated the fund in question was deposited in the Kansas City bank. But the fact does not appear in the evidence brought to this court and is not entitled to consideration." page 457, (per Judge Cotteral).

The only mention of the subject in the decisions of the Seventh Circuit which we have found is in *Martin* v. *Drexel Ice Cream Co.*, 80 F2d 768, where Judge Alschuler says, at page 770,

> "The court's opinion, or memorandum of opinion, is not a finding of fact or conclusion of law."

In such holding, the court was consonant with all of the applicable decisions and set a principle which was disregarded by the court below.

The court below has gone far beyond the lengths forbidden in the cases quoted from and referred to *supra*. To bolster a "strict record" lacking a certificate of evidence, the nature of certain evidence being pertinent to its inquery, it has examined the trial court's opinion, based a conclusion upon a conclusion, and adjudged that the evidence under consideration was impertinent to the question involved. This is a new tack in the jurisprudence of review. We believe it a decidedly dangerous method of settling the merits of a controversy. If the evidence was pertinent, as it plainly was, and not in the record, which must be conceded, the court must have affirmed under principles set out in subdivisions II to IV above.

## VI.

**A decree in equity, if right for any reason, must be affirmed.**

The foregoing principle has been completely forgotten by the court below. It is well established in the jurisprudence, a recent succinct statement being that of Mr. Justice Brandeis in the case of *Helvering* v. *Gowran*, 302 U. S. 238, at page 245,

> "In the revision of judicial proceedings, the rule is settled that, if the decision below is correct, it must be

affirmed, although the lower court relied upon a wrong ground or gave a wrong reason'' (Citing many cases).

On the present record, there is no authoritative means of settling the question of whether or not the decree of the lower court was correct. This question can be determined only when the evidence offered at the hearing is preserved for review. Because of the absence of such evidence from this record, the precise determination of the controversy has become impossible, the parties at fault, if any there be, are the respondents Anna E. Tanner et al., and a decision which permits them the advantage of their fault certainly disregards the usage and custom of orderly judicial procedure.

Some of the facts being unknown, it is obviously possible that under some theory or other the decree of the trial court could well have been right and, as we have indicated, the principle announced by Mr. Justice Brandeis above then becomes applicable. The decree then must be affirmed.

Disregard of this principle affords yet another reason why certiorari should be granted in this case.

## VII.

**The law of Illinois, as expressed in its statutes, (Ill. Rev. Stat., 1939, Ch. 3, Sec. 200) is that legacies to descendants of the testator do not lapse when the legatee dies before the testator.**

The court below has stated in its opinion that the law of Illinois is exactly the opposite of what the Illinois Statutes specify the law to be.

The point around which this misstatement of the law revolves is crucial in an interpretation of the will under the court's theory that deciding what a testator intends is purely a matter of law. A development of the details of the

matter would require extensive discussion, but the misapprehension of the court may be pointed out briefly. The opinion (R. 173, last three lines) states,

> "* * * for upon the death of either (son), before the mother's death, the devise would lapse and become a part of her personal estate."

The devise to a son would not lapse, if such son did not survive his mother, but under the provisions of Section 200, Chapter 3 of the Illinois Revised Statutes, 1939, the son's issue, if any, as there were in this case, would take the estate devised under the will and there would be no lapse.

The point being crucial, petitioner is irreparably harmed when the court assumes the law to be contrary to what a statute says it is. The pronouncement, of course, is impossible as a precedent. It is nevertheless in the books to mislead and confuse. Certiorari is eminently appropriate in such situations to correct the error.

Due process on a hearing requires, at the very least, that well-known statutes called to the attention of a court shall be applied to admitted facts in accordance with their plain language. It is more than a mere erroneous decision of which petitioner seeks review.

## CONCLUSION

For the foregoing reasons, petitioner respectfully urges that the writ of certiorari be granted herein in accordance with the prayer of his petition.

All of which is most respectfully submitted.

CARL V. WISNER,
CARL V. WISNER, JR.,
*Solicitors for Petitioner.*

EARNEST A. SKINNER,
*Of Counsel.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940.

## Nos. 571 and 572

ARTHUR T. HORMANN,

*Petitioner,*

*vs.*

THE NORTHERN TRUST COMPANY, A CORPORATION, JOHN RUSSELL TANNER, WILBUR CLARK TANNER, ANNA E. TANNER, THEODORE W. TANNER AND EMILY TANNER PEARSON,

*Respondents.*

**BRIEF OF RESPONDENTS, ANNA E. TANNER, THEODORE W. TANNER AND EMILY TANNER PEARSON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.**

HAMILTON MOSES, JR.,
*Solicitor for Respondents, Anna E. Tanner, Theodore W. Tanner and Emily Tanner Pearson.*

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

## SUBJECT INDEX.


PAGE

Opinion of the Court Below ..... 1

Jurisdiction of This Court ..... 2

Additional Statement of the Case ..... 2

Reasons Relied on for the Denial of the Writ ..... 3

Argument:

I. Upon the record before the Circuit Court of Appeals in and for the Seventh Circuit, that Court was required to determine whether or not, as a matter of law, the facts found by the District Court supported the Decree ..... 5

II. In an appeal from a Decree construting a will, the Appellate Court can determine whether the Decree is correct, as a matter of law, when the findings of fact, though not the evidence, are in the record ..... 8

III. Upon their appeal, Respondents did not attack the findings of fact upon the ground that they were not supported by the evidence. Petitioner's citations in Part II and III of his brief are therefore not in point ..... 10

IV. Respondents had no duty to preserve the evidence in the record because their appeal raised no question affecting the sufficiency of the evidence or rulings thereon ..... 12

V. The Circuit Court of Appeals looked to the decision of the trial court to show that Petitioner's motion sought to repair his own failure to preserve a record upon which he could assign error. The decision is a part of the record and can properly be examined ..... 13

VI. If the Decree might have been sustained upon matters other than appeared in the record, it was the duty of the Appellee to require that they be preserved in the record for the Circuit Court of Appeals ..... 14

VII. The Circuit Court of Appeals properly applied the law of Illinois to the construction of the will and overlooked no pertinent Illinois statute ..... 15

Conclusion ..... 16

Appendix ..... 17

## Table of Cases.

American Employers Insurance Co. v. Franklin Savings & Loan Assn. of Macon, Georgia, 89 Fed. (2) 224 (1937 C. C. A. 5) ..... 6

American National Red Cross v. Raven Honey Dew Mills, 74 Fed. (2) 160, 162 (1934 C. C. A. 8)..... 11

Atwood v. Covernor, 8 N. E. (2) 916 (1937 Mass.).... 6

Barton v. Automobile Insurance Co., 63 Fed. (2) 631, 635 (1933 C. C. A. 1) ..... 10

Bennett v. Packard, 39 Atl. 739, 741 (1889 Conn.)..... 9

Bills v. Putnam, 15 Atl. 138, 141 (1888 N. H.)..... 9

Bogan v. Hynes, 65 Fed. (2) 524 (1933 C. C. A. 9).... 9

Brown Sheet Iron & Steel Co. v. Maple Leaf Oil Refining Co., 68 Fed. (2) 787, 788 (1934 C. C. A. 8).... 11

Cameron v. United States, 148 U. S. 301, 305..... 9

Chicago, Milwaukee & St. Paul Ry. Co. v. Clark, 178 U. S. 353, 364..... 6

Cody Trust Company v. Hotel Clayton Co., 293 Ill. App. 1, 11 (12 N. E. (2) 32)..... 6

Dalton v. Hazelet, 182 Fed. 561, 570 (1910 C. C. A. 9).. 5

Detroit Trust Company v. Woodworth Collector, 110 Fed. (2) 829 (1939 C. C. A. 6)..... 5

First National Bank of Aberdeen v. Crammer, 175 N. W. 881, 1920 S. D..... 7

First National Bank v. Thompson, 186 S. W. 826, (1916 Ark.) ..... 7

Fletcher v. Laws, 64 Fed. (2) 163, 165 (1933 C. C. A. D. C.) ..... 6

Ford v. Grimmett, 278 Fed. 140 (1922 C. C. A. 5)..... 11

Fraad Talking Machine Co. v. Empire Manufacturing Co., 250 Fed. 618, 619 (1918 C. C. A. 2)..... 11

Harris, et al. v. United States, 70 Fed. (2) 897 (1934 C. C. A. 4) ..... 11

Hegarty v. National Refining Co., 204 Pac. 144, (1921 Kans.) ..... 7

Hollenbeck v. Leimert, 72 Fed. (2) 480 (1934 C. C. A. 7) ..... 5

In Re Donnallan's Estate, 127 Pac. 166, 168 (1912 Cal.) ..... 9

In Re German Ditch & Reservoir Co., 139 Pac. (2) 6, 7 (1913 Colo.) ..... 7

In Re Los Angeles Lumber Products Co., 100 Fed. (2) 963 (1939 C. C. A. 9) ..... 6

Interstate Folding Box Co. v. Empire Box Corporation, 68 Fed. (2) 500 (1934 C. C. A. 7)..... 11

Kansas City & Ft. Smith Co. v. Reese, 42 Pac. 832 (1895 Kans.) ..... 7

King v. Stephens, 215 Pac. 311 (1923 Kans.)..... 7

Kracke v. Cohen et al., 205 Pac. 13 (1922 Wash.)..... 8

Madison County Trust & Deposit Co. v. Smith, 182 N. E. 12 (1932 N. Y.)..... 7

Maguire v. Bliss, 22 N. E. (2) 615 (1939 Mass.)..... 6

Perry v. Wiggins, 57 Fed. (2) 622 (1931 C. C. A. 8)... 9

Prentice v. Stearns, 113 U. S. 435..... 6

Preston v. Foster, 55 Atl. 558, 559 (1903 Conn.)..... 9

Pulaski-Lonoke Drainage District et al. v. Missouri-Pacific Railroad Co., 44 Fed. (2) 899 (1930 C. C. A. 8) ..... 13

Reilly v. Beekman, 24 Fed. (2) 791 (1928 C. C. A. 2).. 11

Shipman v. Straitsville Mining Co., 158 U. S. 356, 361. 6

State Farm Mutual Auto Insurance Co. v. Coughran, 303 U. S. 485 ..... 6

Tatum v. Davis, 283 Fed. 948 (1922 C. C. A. 8)..... 6

The Propeller Burlington, 137 U. S. 386, 391 ..... 6

Town of Lexington v. Governor, 3 N. E. (2) 19, 21 (1936 Mass.) ..... 7

Townsend v. Beatrice Creamery Co., 138 Fed. 381 (1905 C. C. A. 8) ..... 11

United States v. Archibald McNeil & Sons Co., 267 U. S. 302 ..... 10

United States v. Pugh, 99 U. S. 965 ..... 6

Walton v. Southern Pacific Co., 53 Fed. (2) 63, 69 (1931 C. C. A. 9) ..... 11

Wyness v. Crowley, 196 N. E. 924 (1935 Mass.) ..... 7

Yangtze Rapid Steamship Co. v. Deutsch-Asiatische Bank, 59 Fed. (2) 9, 11 (1932 C. C. A. 9) ..... 6

TABLE OF STATUTES.

U. S. Revised Statutes, Sec. 649 (28 U. S. C. A. Sec. 773) ..... 9

U. S. Revised Statutes, Sec. 700 (28 U. S. C. A. Sec. 875) ..... 9

Ill. Revised Statutes, Chap. 3 Sec. 200 (Smith-Hurd Ill. Ann. Stats. Chap. 39, Sec. 11) ..... 15

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940.

## Nos. 571 and 572

ARTHUR T. HORMANN,

*Petitioner,*

*vs.*

THE NORTHERN TRUST COMPANY, A CORPORATION, JOHN RUSSELL TANNER, WILBUR CLARK TANNER, ANNA E. TANNER, THEODORE W. TANNER AND EMILY TANNER PEARSON,

*Respondents.*

## BRIEF OF RESPONDENTS, ANNA E. TANNER, THEODORE W. TANNER AND EMILY TANNER PEARSON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

The respondents, Anna E. Tanner, Theodore W. Tanner and Emily Tanner Pearson, respectfully submit that the petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit be denied and in support thereof submit the following:

### I.

### Opinion of the Court Below.

The opinion of the Circuit Court of Appeals in and for the Seventh Circuit is reported in 114 F. (2d) (Advance Sheets) 118.

## II.

### Jurisdiction of This Court.

The brief of petitioner states (Brief, p. 9) that jurisdiction of this court is asked for the single purpose of determining whether or not the Circuit Court of Appeals in and for the Seventh Circuit should have granted petitioner's motion to dismiss the appeal of the respondents, or to affirm the decree. The brief has, however, presented other matters for consideration which were not involved in said motion. Respondents shall through necessity be required to answer such matters though they be beyond the scope of said petition.

## III.

### Additional Statement of the Case.

Petitioner's complaint (R. 2) filed in the Federal District Court for the Northern District of Illinois, Eastern Division, sounded in law and demanded judgment against the Northern Trust Company upon an alleged indebtedness. The case was, however, subsequently transferred to the equity side of the court by reason of the intervention, with leave of the court, by these respondents. The intervening petition (R. 8) prayed for a construction of the will of Sarah DeLoss and that prayer was, in effect, joined in by the respondent, Northern Trust Company (R. 21) and by the respondents, John Russell and Wilbur Clark Tanner (R. 50). The District Judge, sitting as a Chancellor, heard the evidence and (pursuant to rule 52(a) of the Rules of Civil Procedure for the District Courts of the United States) made findings of fact (R. 71) which were expressly based "upon the evidence heard in open court" (R. 71). The findings set forth the conclusions of the court as to the *facts* proven by the *competent* evidence

and included *none of the evidentiary facts* introduced. The Chancellor prepared and filed with his findings conclusions of law (R. 81) which were introduced by the following statements, "The court further finds and concludes, *as a matter of law,* from said *will* of Sarah DeLoss, deceased, as follows:" (R. 81) (Italics ours), followed by the construction of the will adopted by the Chancellor (R. 81-83) The decree (R. 84) distributed the property held by the respondent, Northern Trust Company, as Trustee, in accordance with the construction of the will embodied in the conclusions of law.

At the close of the trial in open court, the District Judge delivered an opinion (R. 59) in which he first ruled upon the objections of these respondents to certain evidence offered by petitioner (R. 61). The objections were sustained and the Judge then proceeded to give the reasons for his construction of the will. He stated emphatically, *"I do not think that one need go outside the four corners of this instrument, this will* of the testatrix, to find what the testatrix meant; I think it is clear" (R. 61) (Italics ours). When the Circuit Court of Appeals in and for the Seventh Circuit reviewed the decree of the District Court, it agreed with the trial judge that the language of the will, and *that alone,* must be examined to discover the intention of the testatrix. In this regard the court said, "The entire will is before us, and that would seem to be sufficient" (R. 174).

## IV.

### Reasons Relied On For the Denial of the Writ.

From the foregoing it is apparent that both the trial court and the Circuit Court of Appeals agreed that the factual matters contained *in the findings* and the *language of the will* were all that were essential or proper for the

decision. Respondents submit that petitioner has failed to show that the ruling by the Circuit Court of Appeals on the petitioner's motion to dismiss the appeal or to affirm the decree is in conflict with the decisions of this or any other court.

The ruling of the Circuit Court of Appeals on the motions is supported by the authorities, namely, in holding that (1) the Circuit Court of Appeals could review the decree entered in an *equity* suit to construe a will, upon a record containing the pleadings, findings of fact, conclusions of law and the decree, without the evidence, to determine whether or not the construction of the will adopted by the decree was correct as a matter of law; (2) in an *equity* suit *to construe* a will, the testator's intention expressed in the will is a question of *law* and not a question of fact; (3) it was the duty of the petitioner, (if he desired the Appellate Court to examine the exclusion of the evidence offered by him at the trial) to cause a certificate of evidence to be included in the record.

It is further submitted that the Circuit Court of Appeals did not, as is asserted by petitioner,

(1) rule that the decree and the findings of fact could be reviewed upon the ground that they were not supported by the evidence,

(2) look to the decision of the trial court to ascertain facts or evidence "in lieu of a certificate of evidence",

(3) overlook a pertinent Illinois statute and did not assume the law to be precisely contrary to that statute.

## ARGUMENT.

### I.

**Upon the Record Before the Circuit Court of Appeals In and For the Seventh Circuit, That Court Was Required to Determine Whether or Not as a Matter of Law the Facts Found by the District Court Supported the Decree.**

The petitioner does not ask a review of the decision of the Circuit Court of Appeals on the merits, but insists that that court did not have before it a record which would enable it to review the decree. Petitioner fails, however, to understand the nature of respondents' appeal to the Circuit Court of Appeals. Respondents' "Statement of Points" (R. 95) limited the appeal to the sole question whether or not, *on the facts found by the court,* the conclusions of law which construed the will and the decree which carried such construction into effect were erroneous as a matter of law (R. 95). Neither the findings of fact, the sufficiency of the evidence, nor any rulings on the evidence were questioned. The Circuit Court of Appeals is sustained by all the authorities in holding that (on this record containing the pleadings, the findings of fact, the conclusions of law and the decree and none of the evidence) it could and must consider the question raised by the "Statement of Points". Indeed, many of the cases cited by petitioner so hold. See:

*Detroit Trust Company* v. *Woodworth, Collector,* 110 Fed. (2) 829 (1939 C. C. A. 6) per Allen, J. (Brief, p. 22.)

*Hollenbeck* v. *Leimert,* 72 Fed. (2) 480 (1934, C. C. A. 7) per Fitz Henry, J. (Brief, p. 22.)

*Dalton* v. *Hazelet,* 182 Fed. 561-570 (1910 C. C. A. 9) per Ross, J. (Brief, p. 23.)

The cases uniformly hold that upon the record such as was presented to the Court of Appeals the court is not only empowered but also must determine whether on the facts as found by the trial court the judgment or decree is correct as a matter of law.

United States Supreme Court Decisions:

*State Farm Mutual Auto Insurance Co.* v. *Coughran,* 303 U. S. 485.

*Chicago, Milwaukee & St. P. R. Co.* v. *Clark,* 178 U. S. 353, 364.

*Shipman* v. *Straitsville Mining Co.,* 158 U. S. 356, 361.

*The Propeller Burlington,* 137 U. S. 386, 391.

*Prentice* v. *Stearns,* 113 U. S. 435.

*U. S.* v. *Pugh,* 99 U. S. 965.

Federal Decisions:

*Fletcher* v. *Laws,* 64 Fed. (2) 163, 165 (C. C. A. D. C. 1933) per Martin, C. J.

*American Employers Insurance Co.* v. *Franklin Savings and Loan Company of Macon, Georgia,* 89 Fed. (2) 224 (1937 C. C. A. 5) per Holmes, J.

*Tatum* v. *Davis,* 283 Fed. 948 (1922 C. C. A. 8) per Lewis, J.

*In re Los Angeles Lumber Products Co.,* 100 Fed. (2) 963 (1939 C. C. A. 9) per Healy, J.

*Yangtsze Rapid S. S. Co.* v. *Deutsch-Asiatische Bank,* 59 Fed. (2) 911 (1932 C. C. A. 9) per Sawtelle, J.

State Decisions:

*Cody Trust Co.* v. *Hotel Clayton Co.,* 293 Ill. App. 1, 11, 12 N. E. (2) 32.

*Maquire* v. *Bliss,* 22 N. E. (2) 615 (1939 Mass.).

*Atwood* v. *Governor,* 8 N. E. (2) 916 (1937 Mass.).

*Town of Lexington* v. *Governor*, 3 N. E. (2) 19, 21 (1936 Mass.).

*Madison County Trust & Deposit Co.* v. *Smith*, 182 N. E. 12 (1932 N. Y).

*King* v. *Stephens*, 215 Pac. 311 (1923 Kans.).

*Kansas City and Ft. S. Cement Co.* v. *Reese*, 42 Pac. 832 (1895 Kans.).

*First National Bank of Aberdeen* v. *Crammer*, 175 N. W. 881, (1920 S. D.).

*First National Bank* v. *Thompson*, 186 S. W. 826 (1916 Ark.).

*In re German Ditch & Reservoir Co.*, 139 Pac. 2, 6-7 (1913 Colo.).

In addition to the foregoing there are three reported State Court decisions in which motions similar to that of petitioner were denied. In each of those cases the record contained only the pleadings, the findings of fact, conclusions of law, and the decree, and the appellees therein contended, (as does petitioner), that in the absence of a Transcript or Certificate of Evidence or a Bill of Exceptions there was nothing before the Appellate Court to review. In the case of *Wyness* v. *Crowley*, 196 N. E. 924 (1935 Mass.) per Rugg, C. J., the Supreme Judicial Court of Massachusetts said, p. 925:

> " 'It must be a rare case where a prevailing party in equity can insist on the printing in full of the evidence, when the appealing party is willing to rest his case before the full court on the pleadings and the report of the material findings by the Judge.' "

*In Hegarty* v. *National Refining Co.*, 204 Pac. 144, (1921 Kans.) the Supreme Court of Kansas said, p. 145:

> "The appellee filed a motion to dismiss the appeal on the ground that the appellant has not caused a transcript of the evidence to be prepared and filed. * * * The appellant raises no question (affecting the evidence) * * * his sole contention is that judgment should have been rendered in his favor on the special

findings, to determine which no evidence is necessary. The appellee, however, wishes to obtain a review of the decision of the trial court on his demurrer to the evidence and other rulings affected by the evidence. As to these matters the appellee is himself in effect the appellant, and it devolves upon him to procure the transcript." (Parenthesis ours.)

In *Kracke* v. *Cohen et al,* 205 Pac. 13 (1922, Wash.) the Supreme Court of Washington said (p. 14):

> "The respondent has moved to dismiss this appeal * * * The grounds * * * are that the appellant has taken no exceptions to the findings of fact or conclusions of law in a law case tried by the court without a jury, and that no bill of exceptions or statement of facts has been filed with the lower court. * * * The respondent has brought here a short record which shows * * * that * * * the court, after having made its findings and conclusions, entered a judgment in favor of respondent. * * * The motion must be denied. * * * It may be that the appellant will contend that the judgment is not supported by the findings and so we can review that question without either a statement of facts or exceptions to the findings of the court."

These three cases have never been overruled. They are decisive of the petition for writ of certiorari.

## II.

**In an Appeal From a Decree Construing a Will the Appellate Court Can Determine Whether the Decree Is Correct as a Matter of Law When the Findings of Fact, Though Not the Evidence, Are in the Record.** (Reply to Petitioner's Brief, pp. 18-20.)

Petitioner apparently agrees with the principles in the foregoing portion of the brief, but insists that they are not applicable to this case. He reasons that the construction of a will is a question of fact and not one of law and, therefore, unless the evidence is before the Circuit Court

of Appeals that question of fact cannot be determined. Petitioner has cited and respondents have found no case which so holds. In the following cases it has been held that the construction of the intention of a testator expressed in the language of a will is *a question of law* and not of fact:

*Preston* v. *Foster*, 55 Atl. 558, 559 (1903 Conn.).
*Bills* v. *Putnam*, 15 Atl. 138, 141 (1888 N. H.).
*Bennett* v. *Packard*, 39 Atl. 739, 741 (1889 Conn.).
*In re Donnellan's Estate*, 127 Pac. 166, 168 (1912 Cal.).

Each of the first three of the above cases were actions in equity to construe a will. In each thereof the reviewing court had before it only a record similar as to contents with that which was before the Court of Appeals in the case at bar. From an examination of each thereof it would appear that the lower court had heard evidence which was not in the record upon review, yet the courts each held that that was a record sufficient upon which to review a decree construing a will.

The only two cases cited by petitioner in support of his contention, we submit, are not at all applicable, for both *Perry* v. *Wiggins*, 57 F. (2d) 622 (1931 C. C. A. 8th) and *Bogan* v. *Hynes*, 65 F. (2d) 524 (1933 C. C. A. 9th) were appeals from judgments in actions *at law* which to try title to real estate and were not suits *in equity* for the construction of a will. In each thereof there was a judgment rendered by the court upon a trial where a jury had been waived. The decisions were controlled by Sections 649 and 700 of the U. S. Revised Statutes (28 U. S. C. A. Secs. 773 and 875 respectively) (See Appendix). Section 649 applies *only* to actions at law and not to actions in equity (*Cameron* v. *U. S.* 148 U. S. 301, 305) and Section 700 by its express terms relates only to the causes of action which arise under Section 649, in addition to which in neither of

those cases relied upon by petitioner was the construction of a will involved. In the *Perry* case there was a will involved in the litigation but the court was not called upon to construe the will, and in the *Bogan* case there was no will involved at all.

Respondents therefore respectfully submit that contrary to the contention of petitioner there is no conflict between the decisions of the Circuit Court of Appeals of the 7th Circuit and other Circuit Courts of Appeal.

## III.

**Upon Their Appeal Respondents Did Not Attack the Findings of Fact Upon the Ground That They Were Not Supported by the Evidence. Petitioner's Citations in Parts II and III of His Brief Are, Therefore, Not in Point.** (Reply to Petitioner's Brief, pp. 20-27.)

In Part III of Petitioner's brief he cites cases to the effect that where the evidence is not before the reviewing court it must be presumed that sufficient evidence was adduced below to sustain the decree. Respondents do not take issue with the holdings of those cases or with that statement of the law. Both, however, are inapplicable to the instant case. The statement of points filed by Respondents clearly shows that Respondents did not question the sufficiency of the evidence (R. 95-106). The cases cited in part II of his brief are not pertinent for the same reason and in addition in each of those cases the record lacked not only a Transcript of The Evidence or a Bill of Exceptions, *but also did not contain findings of fact.* Those cases are as follows:

*U. S.* v. *Archibald McNeil & Sons Co.*, 267 U. S. 302 (p. 20).

*Barton* v. *Automobile Ins. Co.*, 63 F. (2d) 631, 635 (1933, C. C. A. 1) (p. 21).

*Reilly* v. *Beekman,* 24 F. (2) 791 (1928, C. C. A. 2) (p. 21).

*Fraad Talking Machine Co.* v. *Empire Mfg. Co.,* 250 F. 618, 619 (1918, C. C. A. 2) (p. 21) judgment also omitted from record).

*Harris, et al* v. *U. S.,* 70 F. (2d) 897, (1934, C. C. A. 4) (p. 21-22).

*Ford* v. *Grimmett,* 278 F. 140, (1922, C. C. A. 5) (p. 22).

*Interstate Folding Box Co.* v. *Empire Box Corp.,* 68 F. (2) 500, (1934, C. C. A. 7) (p. 22).

*Townsend* v. *Beatrice Creamery Co.,* 138 F. 381 (1905, C. C. A. 8) (p. 23).

*Brown Sheet Iron & Steel Co.* v. *Maple Leaf Oil Ref. Co.,* 68 F. (2d) 787, 788 (1934, C. C. A. 8) (p. 23).

*American Natl. Red Cross* v. *Raven Honey Dew Mills,* 74 F. (2) 160, 162, (1934, C. C. A. 8) (p. 23).

*Walton* v. *So. Pac. Co.,* 53 F. (2d) 63, 69, (1931, C. C. A. 9) (p. 23).

The record before the Circuit Court of Appeals in the case at Bar *did* contain findings of fact and Respondents accepted them as correct and limited their appeal to the question whether those findings supported the decree as a matter of law. None of the cases cited by Petitioner in Argument II (except those cited in I hereof) and III of his brief are decisions on that question.

## IV.

**Respondents Had No Duty To Preserve the Evidence in the Record Because Their Appeal Raised No Question Affecting the Sufficiency of the Evidence or Rulings Thereon.** (Reply to Petitioner's Brief, pp. 27-31.)

Respondents upon their appeal below assigned no error to the rulings of the Trial Court upon the evidence and they did not contend that the findings of fact were not supported by the evidence. (Statement of Points, R. 95-106.) They accepted the findings of fact as true and correct. Their appeal was directed solely to the construction of the will contained in the conclusions of law and effectuated by the decree. The pleadings, the findings of fact (including the will), the conclusions of law and the decree were the only matters relevant to the errors asserted. The evidence would have burdened the record unnecessarily as it was immaterial to the points to be raised on the appeal.

The Rules of Civil Procedure for the District Courts of the United States contemplate that an appeal might properly be prosecuted upon a record of just this character. Rule 75(d) provides that if an appellant does not include the evidence in the record he shall serve on the appellee a concise statement of points setting forth the matters on which he intends to rely on appeal. The only purpose of that rule is to give the appellee, if he desires it, the opportunity provided by Rule 75(a) to require that the evidence be included in the record. In view of Rule 75(e), had respondents included the evidence they would have subjected themselves to additional expense because that evidence was "matter not essential to the decision of the questions presented by the appeal." When the statement of points was served upon petitioner he should have determined whether the evidence was essential to his side of the case and should then have designated it for inclusion in

the record. But, says petitioner, at that time he examined the decisions, and relying upon the case of *Pulaski-Lonoke Drainage District, et al.* v. *Missouri Pacific Railroad Company*, 44 Fed. (2d) 899 (C. C. A. 8, 1930), concluded that he was absolved of the duty to preserve the evidence. Respondents submit, however, that had petitioner carefully read that decision he would not have arrived at that conclusion. The errors assigned and set forth at page 901 of that opinion, as the Court said, page 901, raised questions of fact:

> "The question presented by these assignments resolves itself into the propriety of the Court's action *in finding* that there had been no change in plans since the judgment * * *." (Italics ours.)

As the *findings* were questioned it was of course necessary for the *appellant* to preserve the evidence in the record. The findings were not attacked in the appeal to the Court below, therefore the duty to preserve the evidence rested upon petitioner and not upon respondents.

## V.

**The Circuit Court of Appeals Looked to the Decision of the Trial Court To Show That Petitioner's Motion Sought To Repair His Own Failure To Preserve a Record Upon Which He Could Assign Error. The Decision Is a Part of the Record and Can Properly Be Examined.** (Reply to Petitioner's Brief, pp. 31-34.)

At page 31 of the brief petitioner contends that the Circuit Court of Appeals improperly used the decision of the District Court "in lieu of a certificate of evidence". Petitioner can, however, ill complain of the court's action because he himself invited it (Point I of petitioner's motion, page 3 of petition) and he urged the admissibility of the evidence at great length in his brief. Thus if error was committed by the Circuit Court of Appeals it was at the

instance of the petitioner. That Court, however, committed no error. It did *not* look to the decision to determine the *substance* of the evidence. It quite properly referred to the decision in order to show that the petitioner's motion was inspired by his failure to preserve errors which *he* and he *alone* desired to assert. The cases cited (pp. 32-34) are not in point. Each involved questions of fact and the court properly refused to examine the trial court's opinion for evidence not in the record. Since those decisions, also, the opinion has become an essential part of the record on appeal (Rules of Civil Procedure for the District Courts of the United States, No. 75(g)), and may now be examined by the Circuit Court of Appeals to discover the reasoning of the trial judge. That judge stated that the language of the will was all that was necessary to his decision. If petitioner thought otherwise he should have placed the evidence before the Circuit Court of Appeals. Respondents submit that the Circuit Court of Appeals committed no error in this respect and the certiorari should be denied upon this point.

## VI.

**If the Decree Might Have Been Sustained Upon Matters Other Than Appeared in the Record, It Was the Duty of the Appellee To Require That They Be Preserved in the Record for the Circuit Court of Appeals.** (Reply to Petitioner's Brief, pp. 34-35.)

Petitioner contends that the Circuit Court of Appeals overlooked the principle that a decree in equity if right for any reason must be affirmed. That Court examined the decree on the record before it. That record contained everything considered by the District Court to be material and competent to its decision. If there were any other reasons not shown by the record for sustaining the decree

it was within the province of the petitioner and it was his duty if he wished to assert them to include them in the record. As petitioner himself has said, it must be presumed that the findings of fact are correct and incorporate all the competent evidence. The converse must also be presumed, namely, that if there was other evidence not incorporated in the findings the trial court excluded it as incompetent. Thus without referring to the decision of the trial court it is obvious that petitioner was attempting by his motion to get before the Circuit Court of Appeals evidence held incompetent by the District Judge and to have that ruling on the evidence reviewed. It is submitted that petitioner's motion was properly denied and that there is no basis for the allowance of certiorari upon this point.

## VII.

**The Circuit Court of Appeals Properly Applied the Law of Illinois to the Construction of the Will and Overlooked No Pertinent Illinois Statute.** (Reply to Petitioner's Brief, pp. 35-36.)

Petitioner insists that in the statement quoted at page 36 of his brief the Circuit Court of Appeals ignored an Illinois statute (Ill. Rev. Stat., 1929, Ch. 3, Sec. 200) (See Appendix), and that its decision was materially affected thereby. Petitioner, however, does not demonstrate the applicability of the statute. The opinion of the Court of Appeals clearly shows that the statement objected to was not material to its decision as it relates to a set of circumstances which did not exist in this case. In that statement the Court by the way of illustration, outlined what disposition would have been made under paragraph 7th of the will had John or Charles predeceased their mother. The fact is that the sons John and Charles survived their mother and, therefore, whether or not their devises would lapse was

not before the Court. The statement of law was, however, correct. The lapse statute of Illinois had no application to this will. The will particularly provided in paragraph 7th against the lapse of legacies and devises. Thus when the Court said that in case of lapse the devise would "become a part of her personal estate" it was construing the effect of paragraph 7th. The section of the statute referred to provides for the disposition of lapsed devises only when "no provision shall be made for such contingency." Such provision was made in paragraph 7th of the will and there was no need, therefore, to resort to the statute and the failure to do so was not erroneous.

**Conclusion.**

For the foregoing reasons respondents respectfully urge that the writ of certiorari be denied, all of which is respectfully submitted.

HAMILTON MOSES, JR.
*Solicitor for Respondents, Anna E. Tanner, Theodore W. Tanner and Emily Tanner Pearson.*

## APPENDIX.

Section 773—U. S. C. A. Title 28:

"Issues of fact in civil cases in any district court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." (R. S. #649.)

Section 875—U. C. S. A. Title 28:

"When an issue of fact in any civil cause in a district court is tried and determined by the court without the intervention of a jury, *according to section 773 of this title,* the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment." (R. S. #700.)

Section 11—Smith-Hurd Ill. Ann. Stats., Chap. 39:

"Whenever a devisee or legatee in any last will and testament, being a child or grandchild of the testator, shall die before such testator, *and no provision shall be made for such contingency,* the issue, if any there be, of such devisee or legatee, shall take the estate devised or bequeathed as the devisee or legatee would have done had he survived the testator, and if there be no such issue at the time of the death of such testator, the estate disposed of by such devise or legacy shall be considered and treated in all respects as intestate estate." (R. S. c. 3 #200.)